(2)

No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. Carden*, 904 F.2d 5 (5th Cir. 1990), *rehearing denied*, August 2, 1990, is in conflict with this Court's decision in *United States Ex Rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

2. Whether a federal court can treat an intervention as a separate action that can proceed to decision after dismissal of the original action for lack of diversity jurisdiction if there are independent grounds for jurisdiction of the intervenor's claim.

3. Whether a court of appeals can affirm a district court's adjudication of claims raised in an intervention when the district court was unable to exercise its discretion to treat the intervention as a separate action because the district court erroneously believed that it had subject matter jurisdiction to hear the original action.

4. Whether strict compliance with the provisions of Rule 4 of the Federal Rules of Civil Procedure is a prerequisite to a federal court's treatment of an intervention as a separate action.

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RESPONDENTS' BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondents Arkoma Associates, et al., in opposition to the petition of Magee Drilling Company for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

[1] The decision of the court of appeals in *Arkoma Associates v. Carden*, 904 F.2d 5 (5th Cir. 1990), after remand from this Court, is set forth in full at page A-39 of the Appendix to petitioner's petition.

STATEMENT OF THE CASE

On May 23, 1985, Arkoma Associates ("Arkoma") filed suit against C.T. Carden ("Carden"), and Leonard L. Limes ("Limes") as the guarantors of Magee Drilling Company's ("Magee") performance as the lessee of equipment leased from Arkoma. During the course of the proceedings in the district court, Magee intervened as a party defendant and a counter-claimant, alleging, among other things, Arkoma's violation of the Texas Deceptive Trade Practices and Consumer Protection Act ("TDTPA"). This was the first time that allegations of TDTPA violations were raised in the district court. Plaintiff accepted service of the counterclaim, by mail, and filed an answer. Intervenor's Answer and Counterclaim, and Amended Answer and Counterclaim appear in the Appendix at pages A-1 through A-9.

Carden and Limes filed a motion to dismiss the main action for lack of diversity jurisdiction based on the common citizenship of Carden, Limes, and a limited partner of Arkoma. Magee did not join that motion with respect to its counterclaim. The district court denied the motion to dismiss, but certified the jurisdictional question for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Fifth Circuit Court of Appeals denied the interlocutory appeal based on its decision in *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986). Thereafter, a petition for certiorari was filed in this Court and denied.

The main demand and the intervention were then tried on the merits, and judgment was rendered in favor of Arkoma on its initial demand and against Carden and

Limes on their counterclaim and Magee on its intervention. Carden, Limes, and Magee appealed. The Fifth Circuit affirmed, found diversity jurisdiction present, and denied rehearing. 874 F.2d 226 (5th Cir. 1989). Carden, Limes, and Magee again sought certiorari to this Court which was granted on May 1, 1989.

On February 27, 1990, this Court rendered its decision and held that the district court lacked jurisdiction over the initial demand because of a lack of complete diversity. 494 U.S. ___ (1990). Consequently, the Court reversed the decision of the Fifth Circuit Court of Appeals and remanded the case for disposition in accordance with its holding. This Court refused to address the jurisdictional issue regarding Arkoma and Magee on Magee's intervention in the first instance and ordered the court of appeals to resolve the issue of whether the intervention by Magee, which admittedly met the Court's complete diversity test, must fall with the main demand by Arkoma.

On June 26, 1990, the court of appeals reaffirmed its previous decision rejecting the counterclaim of Magee against Arkoma and found that the intervention was properly tried as a separate independent action, even though the main demand was dismissed for lack of complete diversity. On July 23, 1990, the court of appeals denied rehearing, and thereafter, Magee submitted an application for certiorari to this Court.

REASONS FOR DENYING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action does not conflict with the decision of this Court in *United States Ex Rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

2. The decision of the Fifth Circuit Court of Appeals in this action follows a consistent line of federal jurisprudence.

ARGUMENT

1. COMPLETE DIVERSITY EXISTED BETWEEN ARKOMA ASSOCIATES AND MAGEE DRILLING COMPANY IN THE PROCEEDINGS BELOW.

It is not disputed that complete diversity existed between Arkoma and Magee. The guidelines for complete diversity appear at 28 U.S.C. §1332 wherein Congress specifically provided, at the time this case was filed, that the federal district courts had original jurisdiction in all civil actions in which the amount in controversy exceeded the sum of $10,000.00 exclusive of interest and costs, and the controversy was between citizens of different states. Because Magee is a Texas corporation, it is a citizen of the State of Texas for diversity purposes. *See* 28 U.S.C. §1332(c). It is also undisputed that none of the general partners or limited partners of Arkoma are, or were at the time the complaint was filed, citizens of the State of Texas. Therefore, complete diversity jurisdiction existed between Arkoma and Magee at the time Magee intervened in this action. *See Arkoma Associates v. Carden*, 905 F.2d 5 (5th Cir. 1990).

2. BECAUSE COMPLETE DIVERSITY EXISTED BETWEEN ARKOMA ASSOCIATES AND MAGEE DRILLING COMPANY IN THE PROCEEDINGS BELOW, THE INTERVENTION BY MAGEE WAS PROPERLY TREATED AS A SEPARATE ACTION AND ALLOWED TO PROCEED TO DECISION EVEN AFTER THE ORIGINAL ACTION WAS DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Federal courts have long held that an intervention will be treated as a separate action and that an intervenor can proceed to decision after a dismissal of the original action if there are independent grounds for jurisdiction of the intervenor's claim. 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, §1917 at 457-59, §1920 at 491 (1986). *See Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675-76 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union*, 718 F.2d 1341, 1351 (5th Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40, 46 (D.C. Cir. 1983); *Horn v. Eltra Corp.*, 686 F.2d 439, 440 (6th Cir. 1982), *cert. denied*, 475 U.S. 1011 (1986); *McKay v. Heyison*, 614 F.2d 899, 907 (3d Cir. 1980); *Atkins v. State Bd. of Educ. of North Carolina*, 418 F.2d 874, 876 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir. 1965); *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Alabama Elec. Coop., Inc. v. United States*, 574 F.Supp. 27, 31 n. 8 (M.D. Ala. 1983); *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec. Workers*, 506 F.Supp. 480, 483 (D. Mass. 1981); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66, 69 (W.D. Pa. 1979). *See also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430-31 (1976).

Magee does not dispute the fact that an intervenor can continue to litigate after the dismissal of the original action. As a matter of fact, one of the cases cited in Magee's brief supports that proposition. *See Harris v. Amoco Prod. Co., supra,* (the court of appeals held that the EEOC, having properly intervened in the original action, could maintain its lawsuit within the scope of the original plaintiffs' claims even after those plaintiffs had settled). Despite that concession, Magee argues, through cases that can be distinguished, that its intervention could not be maintained after the main demand was dismissed for want of jurisdiction.

Alternatively, Magee argues that the intervention could not be treated as a separate suit after the dismissal of the original action because the district court never exercised its discretion to try the intervention separately, nor was service of the intervention made in accordance with Rule 4 of the Federal Rules of Civil Procedure. These arguments are so specious that they defy logic. How could the district court have exercised its discretion to hear the intervention independently of the main action when the district court erroneously believed that subject matter jurisdiction existed for the entire matter? To argue otherwise would be to suggest that the district court should have anticipated this Court's dismissal of the main action and, therefore, should have protected the record with a discussion of how it would use its discretion in the event a higher court decreed that it lacked subject matter jurisdiction.

Magee's argument that the intervention could not be treated as an original suit merely because service was not effected pursuant to Rule 4 of the Federal Rules of Civil

Procedure is, likewise, nonsensical. It is axiomatic that any objection to service of process is automatically waived when an appearance is made. In this case, Magee intervened in the lawsuit and filed an answer and amended answer to Arkoma's complaint and a counterclaim and amended counterclaim against Arkoma, alleging, among other things, an entirely new cause of action – violations of the TDTPA. Magee effected service by regular mail. Thereafter, Arkoma answered the intervention and amended intervention and joined issue on all issues raised by Magee. Any defect in service which, ironically, is being raised now by the very party that may have effected service improperly, became moot when Arkoma answered the intervention.

It is important to note that the claims raised by Magee in its intervention could have been filed in any district court that could assert jurisdiction over Arkoma. Magee chose the Eastern District of Louisiana. It filed a complaint, effected service by mail, received an answer, participated in discovery, tried its case, lost, appealed, and now seeks to ask this Court to ignore all of its actions to get a second bite at the apple. Magee's intervention set forth issues stemming from the lease agreement, while Carden's and Limes' claims were related to their defenses to the guarantee agreement. In addition, Magee brought an entirely new cause of action claiming Arkoma's violation of the TDTPA. Magee was neither a necessary nor indispensable party to the main demand. Carden and Limes were neither necessary nor indispensable parties to the intervention. Under these circumstances, district courts have the discretion to treat an intervention as a

separate action in order to adjudicate the claims raised by the intervenor. *Harris v. Amoco Prod. Co.*, 768 F.2d at 675.

3. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES EX REL. TEXAS PORTLAND CEMENT CO. V. MCCORD*.

Magee argues that the fate of its intervention must abide by the disposition of the main demand because Magee's intervention was tried as an ancillary matter appended to the main demand. In support of its position, Magee cites *McCord, supra*, as well as a line of Fifth Circuit cases dating back to 1927. However, the cases cited by Magee, if read in their entirety and not merely cited piecemeal, are factually distinguishable. They are not authority for the proposition that an intervention can never be maintained after the dismissal of the main demand because of the court's lack of subject matter jurisdiction over the original action.

In *McCord*, W. Illingsworth, a creditor who had performed work for the United States pursuant to a contract entered into between the United States and McCord, had no independent grounds to file suit. His participatory rights were conditioned upon a specific federal statute that permitted him, as a beneficiary under the bond supplied by McCord, to intervene in an action instituted by the United States or by other creditors in the name of the United States if the United States did not bring suit within six months after the complete performance and settlement of the contract. Mr. Illingsworth intervened in the already existing lawsuit, which had been filed prematurely by other creditors, in an attempt to "breathe life

into a 'non-existent' law suit." *Fuller v. Volk*, 351 F.2d at 328. The Court held that the intervention, which was brought at a time when the original suit could have been brought, could not cure the defect in the original suit. The Court held that Mr. Illingsworth's right to intervene and file a claim, which was conferred by a particular statute setting forth specific requirements, presupposed an already existing lawsuit properly brought under the terms of the statute. Simply stated, the Court held that there was no case in which to intervene, and the intervention could not cure the defect in the original suit.

Specifically addressing the issue of whether the intervention could be treated as an original suit, the Court held that it could not because no service of the intervention was made or was attempted to be made, as required by the particular statute at issue in the case, when original actions were brought by creditors. That statute specified a particular method of service, which, apparently, could not be waived:

> [I]n all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

McCord, 233 U.S. at 161, n. 1.

The Magee intervention was not filed to attempt to revive a non-existent lawsuit, nor was it filed to cure any

defect in the original suit. The intervention was brought voluntarily by a dispensable third-party who gratuitously joined the original defendants in alleging defenses, and, more importantly, who also brought a counterclaim that included a totally separate and independent cause of action than the counterclaim brought by Carden and Limes. In addition, had Magee simply filed a separate lawsuit and moved to consolidate, Arkoma's answer would have rendered moot any failure on the part of Magee to serve the complaint as specified in Rule 4 of the Federal Rules of Civil Procedure.

The other cases cited by Magee also can be distinguished. In *Kendrick v. Kendrick,* 16 F.2d 744 (5th Cir. 1926), *cert. denied,* 273 U.S. 758 (1927), an intervention was filed in an attempt to change the nature of the pending suit in order to create jurisdiction for that suit. The intervenors were actually indispensable parties in the original suit, which did not meet the minimum amount in controversy requirement. The court characterized the intervening petition as "merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist. . . . " *Id.* at 746.

Once again, in the case at bar, Magee did not intervene in an attempt to change the nature of the pending suit or to breathe life into a defective suit. Magee was not an indispensable party to the original suit. That suit was simply a suit on a guaranty agreement. Arkoma did not have to sue Magee to collect damages under the guaranty. Similarly, Magee's claims in the intervention set forth completely independent issues and requests for relief.

Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980), *rehearing denied*, 618 F.2d 781 (5th Cir. 1980), did not involve an intervention. The question raised in *Truvillion* was whether the filing of a jurisdictionally defective suit by the EEOC, in which the charging party did not intervene, cut off the charging party's right to bring her own suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq*. Since a private plaintiff's sole avenue of redress is by intervention if the EEOC files suit, *id*. at 525, an intervention in an EEOC case cannot be considered an original action, and there are no independent grounds for jurisdiction of the intervenor's claim.

Obviously, the case at bar does not involve an EEOC matter wherein the charging party's right to intervene is the sole avenue of redress if the EEOC files suit. Furthermore, Magee's intervention, unlike an intervention in an EEOC case, constituted an original action against Arkoma with completely independent jurisdictional grounds which could have been filed as a separate suit in any federal district court.

In *Non Commissioned Officers Ass'n of the United States v. Army Times Publishing Co.*, 637 F.2d 372 (5th Cir. 1981), *modified and reinstated*, 650 F.2d 83 (5th Cir. 1981), subject matter jurisdiction in the original action, or the lack thereof, was not at issue. At issue was whether a party could intervene in a case which had been settled four years earlier.

In the case at bar, Arkoma clearly had a cause of action which, unfortunately, was filed in a court which this Court later held did not have subject matter jurisdiction. Filing an intervention in this type of case, in which

there is a viable cause of action, is clearly different than attempting to file an intervention into a matter which had been settled four years earlier and previously dismissed.

In *Harris v. Amoco Prod. Co., supra,* the intervenor, the EEOC, was allowed to continue the case once the plaintiffs had settled. Once again, subject matter jurisdiction was not at issue. Furthermore, a careful reading of *Harris* shows that an intervenor's "participatory rights," that is, for example, the right to move to dismiss the proceeding or to challenge the subject matter jurisdiction of the district court, "remain subject to the intervenor's threshold dependency on the original parties' claims. . . ." *Id.* at 675. However, an intervenor does not necessarily participate in the original action when it files a completely independent action which asserts new and independent issues and claims for damages. In that event, if the main action is dismissed or the plaintiffs drop out, the court has the "discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." *Id., citing Fuller v. Volk,* 351 F.2d at 328.

Perhaps Magee's intervention should have commenced as a separate action and been consolidated with the Arkoma claim, but that was not done. However, the name assigned to a pleading is not necessarily binding on a court. To achieve substantial justice, a court should look beyond the name and focus on the content of the pleading. *See* 71 C.J.S. *Pleading* §5 (1951). *See also In Re Gen. Motors Class E Stock Buyout Sec. Litig.,* 694 F.Supp. 1119, 1131 (D. Del. 1988). Mere form should not prevail over substance.

4. MAGEE'S INTERVENTION WAS NOT AFFECTED BY THE DISMISSAL OF THE MAIN DEMAND BECAUSE THE INTERVENTION WAS NOT ANCILLARY TO THE MAIN DEMAND, AND THERE EXISTED INDEPENDENT JURISDICTIONAL GROUNDS TO SUPPORT THE INTERVENTION.

When the district court granted Magee's motion to intervene, it did not specify the grounds for permitting the intervention. However, for several reasons, it can be argued that the intervention was merely permissive. First, if Magee sought to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, it would have so specified because intervention pursuant to this section is preferable to permissive intervention pursuant to subsection (b). Second, the circumstances did not exist to permit intervention of right pursuant to subsection (a). A statute of the United States did not confer an unconditional right to intervene, and Magee's interest was represented adequately by the existing parties. In addition, Magee's claims and defenses, other than its claim under the TDTPA, were almost identical to the claims and defenses of Carden and Limes, the existing parties, thus providing common questions of law and fact.

Since Magee's intervention was permissive under Rule 24(b), it was not ancillary to the main proceeding, and therefore, it was not affected by the dismissal of the main demand. *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d at 688; *Schomber By Schomber v. Jewel Companies, Inc.*, 614 F.Supp 210, 213 (N.D. Ill. 1985); *Fritts v. Niehouse*, 604 F.Supp. 823, 826 (W.D. Mo. 1984), *aff'd*, 774 F.2d 1170 (8th Cir. 1985).

While Magee correctly cites the general rule that a prerequisite of an intervention is an existing suit within the court's jurisdiction, there are two recognized exceptions to this rule. First, an intervenor with an independent basis for jurisdiction may be treated as stating a wholly separate claim. *Horn v. Eltra Corp.*, 686 F.2d at 440, *citing Atkins v. State Bd. of Educ. of North Carolina, supra; Fuller v. Volk, supra.* Second, an intervenor who becomes a member of a class action may be permitted to proceed with the action even though the claim of the named plaintiff has become moot. *Id.* (Citation omitted.) In *Fuller, supra,* the main demand was dismissed because the court lacked subject matter jurisdiction. However, the court stated that the intervention would be maintained if independent grounds for jurisdiction existed. The court wrote:

> [A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor. [Citations omitted.] This discretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in an unnecessary delay. By allowing the suit to continue with respect to the intervening party, the court can avoid the senseless "delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." [Citation omitted.]

Id. at 328-29. *See Alabama Elec. Coop., Inc. v. United States, supra,* (intervention is properly before the court if it has an independent basis for jurisdiction, even if the court did not have subject matter jurisdiction over the main action); *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec.*

Workers, supra, (an intervention can continue even if the main action is dismissed for jurisdictional deficiencies). *See also Simmons v. Interstate Commerce Comm'n, supra,* (intervenor with independent grounds for jurisdiction can continue litigation even if court lacked original subject matter jurisdiction); *McKay v. Heyison, supra,* (intervention is discretionary even if the court lacked jurisdiction over the original claim).

In *Alabama Elec. Coop., Inc. v. United States,* the plaintiffs, which the court characterized as "private plaintiffs," filed suit in federal district court challenging the validity of certain actions of the Interstate Commerce Commission. The intervenors, which the district court labeled "state plaintiffs," intervened in the lawsuit seeking similar relief. The court held that the "private plaintiffs' " challenges to the validity of certain ICC actions were exclusively within the jurisdiction of the courts of appeals. Therefore, the court dismissed the "private plaintiffs' " action. However, the court held that the "state plaintiffs' " challenges had a jurisdictional basis independent of the original plaintiffs. Therefore, the court held that the "state plaintiffs' " challenges, by intervention, nevertheless were properly before the court and could continue even after the dismissal of the private plaintiffs' claims.

In *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec. Workers,* the EEOC brought suit against the International Brotherhood of Electrical Workers and its Local 103 for redress of alleged retaliatory actions. The charging party intervened of right and filed his own complaint against Local 103 and the International Brotherhood of Electrical Workers. While the EEOC's suit was dismissed for its

failure to show the jurisdictional prerequisites for its own suit, the court held that the charging party had an independent jurisdictional basis for his claim against the International Brotherhood of Electrical Workers, and therefore, the charging party could continue to litigate his claim even though the EEOC's suit had been dismissed for jurisdictional defects.

In *Simmons v. Interstate Commerce Comm'n*, the ICC issued two notices proposing separate reductions in the annual reporting requirements of, respectively, Class I railroads and Class I and II motor carriers. The plaintiff filed a petition to review both rules. More than sixty days after the entry of the final order of the agency, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (IBT) moved to intervene in the action. The court found that the plaintiff lacked a jurisdictional basis to bring his action. Furthermore, the court dismissed IBT's intervention because IBT had no jurisdictional basis of its own. In its reasoning, the court implied that even though the original party lacked a jurisdictional basis for his cause of action, the intervenor could have continued the lawsuit if it had an independent jurisdictional basis to do so.

> An intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction. . . . The cases cited by IBT do not dispute this fundamental rule. All but one of them involve either (1) continuation of a suit by an intervenor after the party who originally provided valid subject matter jurisdiction has left the case, . . . or (2) continuation of a suit by an intervenor who himself provided such jurisdiction . . . . IBT must be dismissed from this suit

> because the original party lacked a jurisdictional basis *and* because IBT has no jurisdictional basis of its own. [Citations omitted. Emphasis added.]

Simmons v. Interstate Commerce Comm'n, 716 F.2d at 46.

CONCLUSION

It is clear that an independent basis for jurisdiction existed with regard to the intervention filed by Magee. The jurisdictional amount was in excess of $10,000.00, and complete diversity existed between all of Arkoma's general and limited partners and Magee. The claims by Magee were independent of the existing litigation and just as easily could have been filed as a separate action. That Magee chose to avoid the separate filing of a complaint and likely consolidation should not detract from the substance of the proceeding.

It is also clear that the district court had subject matter jurisdiction over the intervention, even though the court lacked subject matter jurisdiction over the main action. Therefore, it is equally clear that the judgment dismissing Magee's intervention is valid and should be maintained as the Fifth Circuit has already held.

Relitigation will cause a senseless and expensive delay of the final resolution of this case and would be, as the Fifth Circuit aptly stated, "a cavalier waste of increasingly limited judicial resources . . . ." *Arkoma Associates v. Carden*, 904 F.2d at 7. Magee, in essence, brought a separate claim which it lost. Magee did not have to file its intervention, and this Court should not permit Magee's

manipulation of the judicial system to give it an unfair advantage by allowing it to retry its case.

For the foregoing reasons, this Court should deny Magee's petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION D, MAG. 4
MAGEE DRILLING COMPANY, INTERVENOR	*	

* *

INTERVENOR'S ANSWER AND COUNTERCLAIM

Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, responds to the complaint of Arkoma Associates (hereafter "Plaintiff"), as follows:

I.

FIRST DEFENSE

The complaint fails to state a claim against Magee upon which relief can be granted.

II.

SECOND DEFENSE

Answering categorically the numbered paragraphs of Plaintiff's complaint, Magee shows:

A) The allegations of Paragraph 1 are admitted;

B) The allegations of Paragraph 2 are denied;

C) The allegations of Paragraph 3 are denied, except to admit that Plaintiff and Magee executed a document styled "equipment lease" dated June 27, 1984 which was

amended July 18, 1984 by an instrument attached to the original answer of C.T. Carden and Leonard L. Limes (hereafter "Carden/Limes") as Exhibit "A" hereafter "Lease");

D) The allegations of Paragraph 4 are denied except to admit that Carden/Limes executed a guaranty agreement which is a written document, the content of which is the best evidence of the guaranty, all allegations in conflict therewith being denied;

E) The allegations of Paragraph 5 are admitted;

F) The allegations of Paragraph 6 are denied except to admit that Carden/Limes received a letter dated February 18, 1985 from James D. Veselich, attorney at law, purporting to notify them of an alleged default by Magee under the terms of the Lease, and acknowledging acceptance of the possession of the equipment which was the subject of the Lease (hereafter "Equipment") by Plaintiff and the receipt of all rental due in connection therewith through the date of repossession;

G) The allegations of Paragraph 7 are denied; and

H) The allegations of Paragraph 8 are denied.

III.

THIRD DEFENSE

Further answering, Defendants show:

A) The Lease is void and Plaintiff's claim unenforceable for the following reasons:

1) The Plaintiff failed to deliver the Equipment, to such an extent as to constitute:

a) Fraud in the execution of the Lease or *fraud in the factum;* and

b) Failure or partial failure of consideration;

2) To the extent that the Lease provides that Plaintiff may regain possession of the Equipment and yet hold Magee and Defendants liable for rental accruing thereafter, the Lease is unconscionable;

3) Those provisions in the Lease calling for the payment of future rental following Plaintiff's repossession of the Equipment constitute an unlawful penalty clause;

4) Plaintiff, Carden/Limes, and Magee repudiated and/or voluntarily terminated the Lease at the time Plaintiff accepted delivery of the Equipment from Magee;

5) By accepting delivery of the Equipment from Magee, Plaintiff:

a) Elected its remedy of Lease cancellation; and

b) Is now estopped to claim enforcement of the Lease;

6) There was no meeting of the minds of Plaintiff, Defendants, and Magee as to the quantity or quality of the Equipment; and

7) Plaintiff failed to minimize any damages which it has sustained;

B) Magee paid all rental due under the Lease until such time as Plaintiff accepted possession of the Equipment from Magee;

C) In the event that this Court finds Magee to be indebted to Plaintiff for any sums whatsoever, Magee is entitled to setoff against any such sums all sums for

which Plaintiff is indebted to Magee, as hereinafter alleged.

IV.

COUNTERCLAIM

Now, assuming the position of counterclaimant, Magee, with respect represents:

A) The following are made defendants in this counterclaim:

1) Arkoma Associates (hereafter "Arkoma"), a partnership organized under the laws of the state of Arizona;

2) David A. Hepburn (hereafter "Hepburn"), domiciled in the State of Arizona;

3) Eldon Qualls (herafter "Qualls"), domiciled in the State of Oklahoma;

4) Richard K. Ledbetter (hereafter "Ledbetter") domiciled in the State of Oklahoma;

5) Dudley B. Merkel (hereafter "Merkel"), domiciled in the State of Arizona; and

B) On information and belief, it is alleged that Hepburn, Qualls, Ledbetter, and Merkel (hereafter collectively "Partners") are designated as the general partners of Arkoma and, as such, liable, jointly, severally and *in solido*, with Arkoma for the obligations of Arkoma.

C) Arkoma, through the Partners, its agents, employees, and/or officers represented to Magee and Carden/Limes that the Equipment leased by Arkoma to Magee would be be (sic) fully outfitted, ready for use, and capable of drilling to a depth of 7,500 feet (hereafter

collectively "Representations") when, in fact, it was not (hereafter collectively "Deficiencies").

D) The Deficiencies were non-apparent to Magee and Carden/Limes or hidden from their view by Arkoma and/or its Partners, agents, employees, and/or officers, but were well known to Arkoma and/or its Partners, agents, employees, and/or officers.

E) Magee and Carden/Limes relied upon the Representations in entering into the Lease.

F) As a result of the Deficiencies, the Equipment could not be used, which resulted in the financial collapse of Magee and the loss of work and revenues amounting to approximately $1,000,000.00.

G) In an effort to render the Equipment usable as represented, Magee expended approximately $500,000.00, to no avail, for which it is entitled to recover of Arkoma.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the costs of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Co., and against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the full and true sum of $1,500,000.00 together with legal interest thereon from

the date of judicial demand until paid and for all costs of these proceedings.

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(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
	*	
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	
	*	MAG. DIV. 4

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INTERVENOR'S AMENDED ANSWER AND COUNTERCLAIM

The amended answer and counterclaim of Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, respectfully represents that it desires to amend its original answer and counterclaim in the following particulars:

I.

By adding the following additional defense:

IV.

FOURTH DEFENSE

Further answering, Magee shows:

A) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's untrue assertions that the Equipment was of a quality sufficient to execute the work for which it was intended; and

B) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's failure to disclose the true quality of the Equipment.

II.

By adding the following paragraphs to the counterclaim:

H) The conduct of Arkoma and the Partners disclose a conscious indifference to the rights of Magee rendering Arkoma and the Partners liable to Magee for exemplary and punitive damages.

I) The facts alleged as set out in paragraphs C, D and E are violations of the Texas Deceptive Trade Practices And Consumer Protection Act rendering Arkoma and the Partners liable to Magee for triple damages.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the cost of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Company, and against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the following amounts:

1. $1,500,000.00 compensatory damages;

2. $1,000,000.00 exemplary and punitive damages; and

3. $4,500,000.00 triple damages;

together with reasonable attorney fees and legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

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